

RENDERED: FEBRUARY 8, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001768-MR

ALEX C. THORNTON

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 04-CR-001647

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING IN PART AND VACATING AND REMANDING IN PART

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE, MOORE AND VANMETER, JUDGES.

VANMETER, JUDGE: Alex C. Thornton, Jr., appeals from an order entered by the Jefferson Circuit Court denying his motion for RCr 11.42 relief. For the reasons stated we affirm in part, and vacate and remand in part for an evidentiary hearing.

In June 2004 Thornton was indicted on three counts of kidnapping, as well as first-degree assault, first-degree burglary, attempted first-degree rape, and first-degree persistent felony offender (PFO). On the July 2005 scheduled trial date, Thornton pled guilty to the charges, as amended to include three counts of first-degree unlawful

imprisonment in lieu of the kidnapping charges. The court accepted Thornton's plea, and he was sentenced to a total of thirty years' imprisonment.

In April 2006, Thornton filed the underlying *pro se* motion seeking RCr 11.42 relief, alleging that he was afforded the ineffective assistance of counsel. The motion was denied without an evidentiary hearing, and this appeal followed. On this court's own motion, the record on appeal was supplemented with the videotape record of the guilty plea proceeding.

Thornton may prevail on his ineffective assistance of counsel claim only if he satisfies the two-part test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which requires a defendant to show that trial counsel's performance was deficient, and that such deficiency prejudiced the defense. *See also Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). The Kentucky Supreme Court described the application of *Strickland* to guilty plea cases as follows:

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Bronk v. Commonwealth, 58 S.W.3d 482, 486-87 (Ky. 2001), quoting *Sparks v. Commonwealth*, 721 S.W.2d 726, 727-28 (Ky.App. 1986). *See also Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

An evidentiary hearing is required on a motion seeking RCr 11.42 relief if any material issue of fact cannot conclusively be resolved by an examination of the

record. *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). A trial court may not simply disbelieve the motion's factual allegations absent refuting evidence in the record. *Id.* at 453.

On appeal, Thornton raises a number of issues in support of his claim that he was afforded the ineffective assistance of counsel below. First, we address his assertion that counsel inaccurately advised that he would be eligible for parole in eight years if he accepted the offered plea agreement and was sentenced to thirty years' imprisonment. In fact, the violent nature of his crimes prevents Thornton from being considered for parole until he serves 85% of his sentence. KRS¹ 439.3401.

Clearly, the provision of gross misadvice regarding parole eligibility may amount to the ineffective assistance of counsel. *Sparks v. Sowders*, 852 F.2d 882, 885 (6th Cir. 1988). As our review of the record, including the videotape of the guilty plea hearing, shows that Thornton's allegation cannot be resolved on the face of the record, he is entitled to an evidentiary hearing as to this facet of his claim.

Next, Thornton asserts that he was provided ineffective assistance because, although counsel advised him that there was no tape recording of the grand jury proceedings, after his guilty plea was entered his parents allegedly found that such a recording in fact existed. Although Thornton surmises that counsel failed to review the tape recording and therefore was inadequately prepared for trial, he has not alleged that the evidence presented to the grand jury differed in any significant respect from that made available through discovery. Thornton therefore has not satisfied his burden of showing that it is reasonably probable that but for his inability and counsel's alleged

¹ Kentucky Revised Statutes.

failure to review the tape recording, he would not have pled guilty but instead would have gone to trial. *Bronk*, 58 S.W.3d at 486-87.

Next, Thornton alleges that he was afforded ineffective assistance when counsel failed to seek the trial judge's recusal after allegedly commenting on the possibility that the judge might show favoritism toward the Commonwealth because of her friendship with the prosecuting attorney. However, even if the attorney's alleged statements were true, they did not provide a sufficient basis for seeking the judge's recusal pursuant to KRS 26A.015(2). Hence, Thornton was not entitled to relief on this ground.

Next, Thornton asserts that he was afforded ineffective assistance when counsel allegedly stated that the trial judge had determined that the jury could hear evidence of his "past criminal record." He alleges that his decision to plead guilty was influenced by his concern about the admissibility of such evidence. Although the record on appeal contains neither a written order nor any indication of whether the court made an oral ruling, it does show that some six weeks before the scheduled trial date the Commonwealth filed a KRE² 404(b) motion seeking to introduce evidence of other crimes, wrongs or acts. Even if the court did not rule on the motion, or even if it ruled in Thornton's favor rather than admitting the evidence, Thornton's criminal history was relevant to the pending PFO charge. It follows that even if we accept at face value Thornton's claim that counsel inaccurately advised him regarding the entry of an order, it is not reasonably probable that absent such error, Thornton would not have pled guilty but instead would have insisted on going to trial. *Bronk*, 58 S.W.3d at 486-87.

² Kentucky Rules of Evidence.

Next, Thornton asserts that he was afforded ineffective assistance when counsel failed to fully inform him regarding all possible lesser included offenses. This claim lacks merit, as a freely entered guilty plea is no less valid because the defendant was unaware of all possible consequences or alternative courses of action. *Turner v. Commonwealth*, 647 S.W.2d 500, 500-01 (Ky.App. 1982).

Next, Thornton complains that despite his request, he was not provided with the opportunity to review discovery until after he entered his guilty plea. He also asserts that the record fails to support trial counsel's alleged assurance that motions to compel discovery were filed. We have found nothing in the record to show that Thornton's counsel filed discovery motions. However, the record does reflect that in response to the court's pretrial discovery order, on several occasions the Commonwealth supplemented the record with additional discovery, pledging that "[a]ny discoverable materials which come into the possession of the Commonwealth after filing of this response will be immediately forwarded to defense counsel." As Thornton has not specifically alleged that any discoverable evidence was not made available to the defense before trial, that he was prejudiced by his inability to conduct a pretrial review of the discoverable evidence, or that he would not have pled guilty in the absence of counsel's alleged error, he is not entitled to relief on this claim.

Finally, Thornton asserts that his guilty plea was not knowing, intelligent and voluntary. The record shows that Thornton admittedly left the scene of an accident and entered the home occupied by the victim and her two young sons. Further, evidence was available to show that when the police officers who were searching for Thornton entered the home after hearing screams, they observed Thornton holding the victim in the

kitchen before escaping to another part of the house. The brutally assaulted victim then was found at the top of the stairs, with her shirt and bra ripped and her pants partially down. Thornton was found hiding under an upstairs bed. Thornton, who was on parole after serving time for prior similar offenses, faced possible imprisonment for twenty to fifty years or life. Given these circumstances, coupled with our review of the guilty plea hearing, we are not persuaded by Thornton's claim that his guilty plea to the amended charges, with a penalty of thirty years' imprisonment, was not knowing, intelligent and voluntary.

The Jefferson Circuit Court's order is affirmed in part, and vacated and remanded in part for an evidentiary hearing regarding the parole eligibility issue discussed herein.

ALL CONCUR.

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